IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. **493** OF **2000**

BOCOUM IBRAHIM MALIENNE
Naigerian National, aged
about 36 years, residing
at 303, Damian Lepora
Street, Bhayander, Dist.
Thane, at present lodged
at Yerwada Central Prison,
Pune. ...Appellant
(Original Accused No.1)

V/s

1. NEERAJ RAI, I.O.
N'Cell Customs Preventive
Commissionerate, Ballard
Pier, Mumbai 400 038.

2. The State of Maharashtra ...Respondents
(Original complainants)

Mr. S.B. Keswani, advocate for the appellant.

Mr. P.S. Thakur, advocate for respondent No.1.

Mr. D.P. Adsule, APP for the State.

CORAM: V.M.KANADE,J.
DATE: 6th May, 2005.

ORAL JUDGMENT:

1. The appellant is challenging the judgment and order passed by the Special Judge, N.D.P.S. Court, Greater Mumbai in N.D.P.S. Special Case No. 256 of 1998. By the said judgment and order dated 27/4/2000, the accused is convicted for the offence punishable under section 29 read with section 8(c) and 21 of the N.D.P.S. Act, 1985 and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs 1 lac

and, in default, of payment of fine to suffer rigorous imprisonment for three months each. He was also convicted under section 21 read with section 8(c) and section 29 and sentenced for the same period . Along with the accused, the accused No.2 Mohammed Farooq Qureshi was also sentenced for the same period for the same offence. The accused No.2, however, was acquitted by this court in appeal which was preferred by him against the said judgment and order.

2. The prosecution case in brief is as under:-

3. The officers of respondent No.1 received an information on 13/6/1998 that one African National by name Bocoum Ibrahim Malienne @ David Soucoum Abrahams residing in Flat No.303, 3rd floor, Damian, Near Arpan Apartments, Lakora Street, Bhayander (West), Thane was trafficking in narcotic drugs and had stored around 1 kg of heroin in the said flat which was occupied by him. Accordingly, a raid was organized. The officers went to the said flat and the accused No.1, the appellant herein opened the door when the officers of the Narcotic Bureau knocked the door. When they entered the flat, they found two more persons sitting in one of the rooms of the flat. Both the persons were Indians and they were introduced by name Farooq

Qureshi and Dawood Fakir Mohammed. The officers of the Narcotic Control Bureau proceeded to take search of the said flat and during the course of the search, they recovered a white shopping bag. From the loft above the toilet and bath-room, a polythene bag was searched and the powder weighing 1.100 kgs was recovered which was found to be heroin, after it was tested. Three samples of 5 gms each were taken. The personal search of the two Indians were taken and during the search of accused No.2, the officers noticed a brown coloured powder packet which was weighed on the scale and found to be weighing 5 gms. It also tested positive for heroin. That was also sealed. The Passport of the appellant was recovered. Their statements were recorded. The charge-sheet was filed. The prosecution adduced oral and documentary evidence. The trial court, on the basis of this evidence, convicted the accused for having committed the alleged offence.

4. I have heard the learned Counsel appearing on behalf of the appellant-accused and the learned counsel appearing on behalf of the respondents.

5. The learned Counsel appearing on behalf of the appellant has taken me through the judgment and oral

and documentary evidence adduced by the prosecution. The learned Counsel appearing on behalf of the appellant has made three submissions. Firstly, he submitted that there was non-compliance of the provisions of section 42 of the N.D.P.S. Act. He has submitted that the information which was received by the Investigating Officer and which was reduced in writing and the copy of which was given to the Superior Officer which is at Exhibit-15 and 16 as also the oral evidence indicates that the provisions of section 42(1) and (2) of the N.D.P.S. Act have not been complied with and that the Investigating Officer is falsified from the report which was reduced in writing. He submitted that on this count alone, the accused was entitled to be acquitted. Secondly, the learned Counsel submitted that the seizure of the contraband was made on 13/6/1998, however, the samples were sent to Dy.C.C. after three days i.e. on 16/6/1998 and to the FSL on 19/8/1998 i.e. after a lapse of more than two months. He has submitted that, therefore, a serious doubt is created regarding the safe custody of the contraband. It was, therefore, submitted that the certificate of the Chemical Analyser looses its sanctity and, therefore, cannot be relied upon. Thirdly, it was submitted by the learned Counsel for the appellant that the Chemical Analyser's

report could not be relied upon as the Chemical Analyser has not mentioned any details or data on the basis of which he arrived at the said conclusion. It was submitted that the Chemical Analyser has not given the methods used by him in the analysis and that he has merely given an opinion which could not be accepted. The learned Counsel relied upon the judgment of this Court in the case of Nicklaus Peter Heel Vs. State of Goa reported in **1998(2) Mh.L.J. 884**. Lastly, it was submitted by the learned Counsel for the appellant that the accused No.2 was acquitted by this Court vide Appeal No.382 of 2000 and further that no satisfactory evidence has been led by the prosecution to show the possession of the flat in question by the appellant. The learned Counsel for the appellant also has tendered a compilation of judgments which shall be considered at the appropriate stage.

6. The learned Counsel appearing on behalf of the respondent No.1, on the other hand, submitted that the prosecution had proved the case against the accused beyond the reasonable doubt and the judgment and order of the trial court was liable to be confirmed. He submitted that the requirement of section 42 had been complied with against both the accused. He further

submitted that the possession of the room by the accused has been sufficiently proved by the additional oral and documentary evidence. He tried to explain the delay in sending the samples to the Dy.C.C. by stating that the next day, after the date of seizure, was an holiday and immediately on 16/6/1998 the sample packets were handed over to the Dy.C.C. They have also tried to explain the delay in sending the samples after two months to FSL. He further submitted that the appellant has given his confessional statement which was subsequently retracted. He submitted that the retraction was made after considerable lapse of time and, therefore, the belated retraction was of no consequence. The learned Counsel appearing on behalf of respondent No.1 has also relied upon number of judgments of this Court and the Supreme Court in support of the said submission.

7. In the present case, the prosecution has examined 15 witnesses. So far as the first submission of the learned Counsel appearing on behalf of the appellant is concerned, it is not possible to accept the said submission that there has been non-compliance of section 42 of the N.D.P.S. Act. From the deposition of P.W.1 - Neeraj Rai and P.W.3 - Keith John Sanchis, it can be seen that on 13/6/1998, at about 1.00 p.m.,

K.J. Sanchis received an information that the accused had stored narcotic contraband heroin and was disposing of the same. The said information was reduced into writing and its gist was prepared at Exhibit-15 and the original information was sent to the Assistant Commissioner Mr. Dewalwar who thereupon gave instructions to raid the premises and, accordingly, at 4.00 p.m., the premises were raided. In view of this evidence, in my view, there has been proper compliance of the provisions of section 42. The submission of the appellant that there was a discrepancy in the quantity of heroin as mentioned in the information which was received and the one which was actually recovered and, therefore, there was non-compliance of section 42, in my view, cannot be accepted. It is possible that the information which was received by him was regarding 10 kgs of heroin and what was really found in the premises was only 1 kg. However, this does not create any doubt regarding non-comliance of the procedure laid down under section 42 of the said Act.

8. There is some substance in the submission made by the learned Counsel appearing on behalf of the appellant in respect of the safe custody of the samples which were sent to the Chemical Analyser and

the cryptic manner in which the Chemical Analyser's Report is tendered by the prosecution, making it difficult to rely on it particularly on account of non-examination of the Chemical Analyser who had given his opinion.

9. P.W. 1 - Neeraj Rai has stated that the contraband was seized from the Flat of accused No.1, the appellant herein on 13/6/1998. He has stated that the panchanama of the seizure was concluded at 5.30 p.m. and, on 14/6/1998 at 3.00 p.m.,the accused were put under arrest and they were produced before the Magistrate on 15/6/1998. He has further stated that on 16/6/1998, he deposited the two samples; one sample from the bulk found from the loft of the room and the one packet which was found with accused No.2 to the Office of Dy. C.C. alongwith test memos and covering letter. He has admitted that from 13/6/1998 till 16/6/1998, the said packets were in his custody. The learned Counsel appearing on behalf of the appellant has relied upon the Division Bench Judgment of this Court in the case of Mohd. Hussainbabamiyan Ramzan Vs. The State of Maharashtra reported in **II(1994) CCR 1223 (DB)**. In the said case, the samples were sent after three days to the Chemical Analyser and no satisfactory explanation was given. The Court

held that, in such cases, the tampering could not be ruled out. In the said case, it was pointed out that there was no satisfactory evidence in respect of the samples "A1" and "B1" being sent to the Chemical Analyser and the entire muddemal except the samples was deposited with the Head Office. It was contended that, therefore, the said samples remained with the Investigating Officer and there was no reason why the same could not be deposited with the Head Office. In the Muddemal Register, the packets which were shown to have been sent to the Chemical Analyser were directly sent to the Chemical Analyser and were not actually deposited with the muddemal. In view of this, the Division Bench observed that the possibility of tampering could not be ruled out and, therefore, this itself was sufficient to discard the certificate of the Chemical Analyser. In the present case also, the original Register has not been produced. No satisfactory explanation, in my view, has been offered in keeping the two samples in the custody of P.W. 1 for three days and keeping another sample which was sent to the FSL after two months. Further, it can be seen that though file numbers have been mentioned in the Chemical Analyser’s report, sample packets do not show any file numbers. P.W.1 in his evidence has stated that the sample packets do not show numbers and

they were written on the spot. Though this was in case of article No.7, in respect of other article Nos. 2,3,4 and 5 they do not bear any file numbers. However, the test memos at Exhibits 23 and 24 in respect of articles 4 and 5 bear file numbers. This evidence coupled with the evidence of samples in the custody of the Investigating Officer does not rule out the possibility of tampering. Ofcourse, this does not mean that P.W. 1 had tampered with the contents of the samples before sending it to the Chemical Analyser. However, it creates a doubt regarding the safe custody of the said samples. Apart from this, there is no evidence or document to show in whose custody the sample packets were kept from 13/6/1998 to 16/6/1998 though P.W.1 in his evidence says that they were in his custody. Yet, the fact remains that there is no documentary evidence to show where the said samples were kept. Another important factor which creates doubt regarding the safe custody of the samples is that the Muddemal Register has not been produced. In my view, therefore, there is serious lacuna in the prosecution case and, as a result, the report submitted by the Chemical Analyser, cannot be accepted and no reliance can be placed on the said report.

10. The prosecution has also not examined the Chemical Analyser who had tendered the Chemical Analyser's report. Exhibit-23 is the test report submitted by Anand Kumar Saxena, the Assistant Chemical Examiner, New Custom House, Mumbai - 400 038. Exhibit-24 is the second report submitted by the same person. Exhibit-33 is a covering letter dated 19/8/1998 sent by K.J. Sanchis to the Director, FSL. With this covering letter, there is an annexure giving details of quantum of seizure, stating that the quantity of 1.100 kgs of heroin was seized on 13/6/1998. Exhibit-34 is the Chemical Analyser's report given by the second expert J.P. Kulkarni who is attached to the FSL, Mumbai as an Assistant Chemical Analyser. Alongwith this report, he has annexed a letter of the same day giving percentage of heroin in the samples which were sent to him. He has stated that the percentage of heroin was 2%.

11. It is an admitted position that both these Chemical Analysers who had analysed the samples have not been examined by the prosecution. Though, it is strenuously urged by the learned Counsel appearing on behalf of the appellant that as a result of non-examination of the Chemical Analyser, the C.A. report has to be discarded on that ground alone, in my

view, the said submission cannot be accepted. Yet, in a case where there is a doubt regarding the safe custody of the samples and also the report submitted by the Chemical Analyser is cryptic and creates doubt whether really a test was performed or the report had been submitted mechanically on the basis of covering letter in which the name of the contraband found was mentioned, in such cases, in my view, it would be difficult to accept the Chemical Analyser's report. In this background it shall be relevant to consider the report submitted by the Chemical Analyser. Exhibit 23 is the report which is submitted by the Chemical Analyser dated 30/6/1998. The Chemical Analyser in its report has tested as under:-

"3. Date of conducting the test result : 30-06-98.

(a) Results of quantitative test : Test sample is in form of brown coloured powder. It answers tests for the presence of Di-Acetyl Morphine (Heroin) hence covered under NDPS Act, 1985"

The report at Exhibit-24 in respect of the other sample which was sent to the Dy.C.C.'s office also shows that the report is identical and verbatim. Similarly, it would also be profitable to consider the report

submitted by the Assistant Chemical Analyser, FSL

which is at Exhibit 34. It reads as under:-

"RESULTS OF ANALYSIS

Heroin(Diacetyl morphine) is detected in the Exhibit along with other opium alkaloids. The exhibit falls under section 2 (xvi) of The Narcotic Drugs and Psychotropic Substances Act 1985."

In a letter which is annexed to this report, the

percentage has been given as under:-

"M.L. Case No.	Exhibit No.	% Heroin
M-562/98	---	2.0"

12. In my view, there is some substance in the submission made by the learned counsel appearing on behalf of the appellant. Both the reports which are sent by the Chemical Analyser; one by the office of the Dy.C.C. and the other by the office of the FSL do not disclose the manner in which the test was conducted. It merely mentions that it is a brown colour substance and is heroin. There is no indication as to how the Chemical Analyser arrived at the said conclusion. The Chemical Analysers who had submitted the report have not been examined by the prosecution. As mentioned hereinabove, the possibility of tampering in this case cannot be ruled out as the samples were not kept in safe custody of

the Head Office. The Muddemal Register has not been produced. There is no documentary evidence to indicate where the samples were kept, though P.W.1 in his evidence says that the samples were kept in his custody. In the light of all these circumstances, the cryptic Chemical Analyser's report assumes importance and in this context non-examination of the Chemical Analyser further assumes importance.

13. The learned Counsel appearing on behalf of the appellant has relied upon number of judgments of this Court and the Supreme Court. The Division Bench of this Court in the case of Nicklaus Peter Heel (supra) has discarded the report submitted by the Chemical Analyser and, on that ground alone, the accused was acquitted of the offence with which he was charged. In the said case, the prosecution has examined the Chemical Analyser as P.W.1. It was argued in the said case by the Counsel appearing on behalf of the accused that the details regarding the manner in which the substance which was sent for analysis was analysed not having been stated, it was not possible to rely upon the report. The Division Bench of this Court relied upon the judgment of the Supreme Court in the case of Murarilal vs. State of M.P. reported in AIR 1980 SC 531, Suleman Usman Menon Vs. The

State of Gujarat, reported in 1961(2) Cri.L.J. 78, Emperor vs. Behram Sheriar Irani, reported in 1944(46) BLR 481, State Vs. Bhausa Hanmantsa Pawar, reported in 1962 NLJ 616 = AIR 1962 Bom. 229 and Mahmood vs. State of Uttar Pradesh, reported in AIR 1976 SC 69 and, in view of the said judgments, examined the evidence of P.W.1 and came to the conclusion that neither the report nor the evidence of P.W.1 had inspired confidence in the mind of the court for coming to the conclusion that the contraband articles were Charas and also L.S.D.

14. In the present case, apart from the fact that the said reports are cryptic, there is no mention regarding the tests which have been conducted by the Chemical Analyser for arriving at the conclusion that the said sample which was sent was narcotic substance. Apart from that, in the present case, both the Chemical Analysers have not been examined which is an additional factor which goes against the prosecution. No explanation has been tendered for non-examination of the Chemical Analysers. The learned Counsel appearing on behalf of the State submitted that non-examination of the Chemical Analyser was not fatal to the prosecution case. In support of the said submission, he relied upon the

judgment of the Supreme Court in the case of Kalema Tumba Vs. State of Maharashtra and another in Criminal Appeal No. 817 of 1998 decided on September, 16, 1999. In the said case, the details of the test was not mentioned in the report of the Chemical Analyser. The Supreme Court in the said case held that the details of the test in the report of the Chemical Analyser was not necessary when the accused had admitted his guilt under section 108 of the Customs Act. The Supreme Court in the said case held that since the appellant had admitted that the chemical was heroin and the other officers of the Bureau had tested the substance found from the appellant, the contention of the appellant in the said case was rejected. The ratio of the said judgment will not be applicable to the facts of the present case. As observed hereinabove, the safe custody of the samples is doubtful. There is no documentary evidence to show as to where the samples were kept for three days and, thereafter, two months before they were sent to Dy.C.C. Office and the Office of the FSL. In this background it is difficult to rely on the Chemical Analysers' reports and the additional circumstance is the non-examination of the Chemical Analysers and the cryptic reports submitted by both these experts which

raise a doubt as to whether the reports have been submitted on the basis of the covering letter which was sent to the Chemical Analysers. Thus, the ratio of the cases on which reliance has been placed by the Counsel for the appellant will have to be accepted in the facts of the present case.

15. The accused No.2 has already been acquitted by this Court vide Criminal Appeal No. 382 of 2000 which was decided by the Judgment and Order dated 10th December, 2001. Though it is true that the accused No.2 was acquitted on the ground that the mandatory provisions of section 50 of the N.D.P.S. Act have not been followed and not on the grounds which are raised in this appeal, the fact remains that the order of the Trial Court has been set aside by the High Court in appeal filed by the accused No.2.

16. In the present case, the statement of the accused has been recorded under section 67 of the N.D.P.S. Act. However, later on, the said statement has been retracted by the appellant. The learned Counsel appearing on behalf of the appellant has submitted that in view of the statement being retracted, the appellant cannot be convicted on the

basis of the confessional statement alone. On the other hand, the learned Counsel for respondent No.1 submitted that the accused was produced on number of occasions before the Special Judge and, after considerable lapse of time, the said statement was retracted. He, therefore, submitted that the retraction of the statement was as a result of the legal advise which was given to the accused. There may be some substance in the submission made by the learned Counsel appearing on behalf of respondent No.1. However, the question which is required to be decided is : whether it would be safe to convict the accused on confessional statement which is recorded under section 67 and which subsequently has been retracted. In my view, taking into consideration the lapses in the prosecution case, it would not be sufficient to rely on the confessional statement which is subsequently retracted.

17. In the result, the appeal is allowed. The judgment and order passed by the trial court is set aside and quashed. Appellant accused is acquitted of the offence with which he was charged. Appellant accused be released forthwith unless he is otherwise required in any other case.

(V.M. KANADE, J.)